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No. 273

# In the Supreme Court of the United States

OCTOBER TERM, 1942

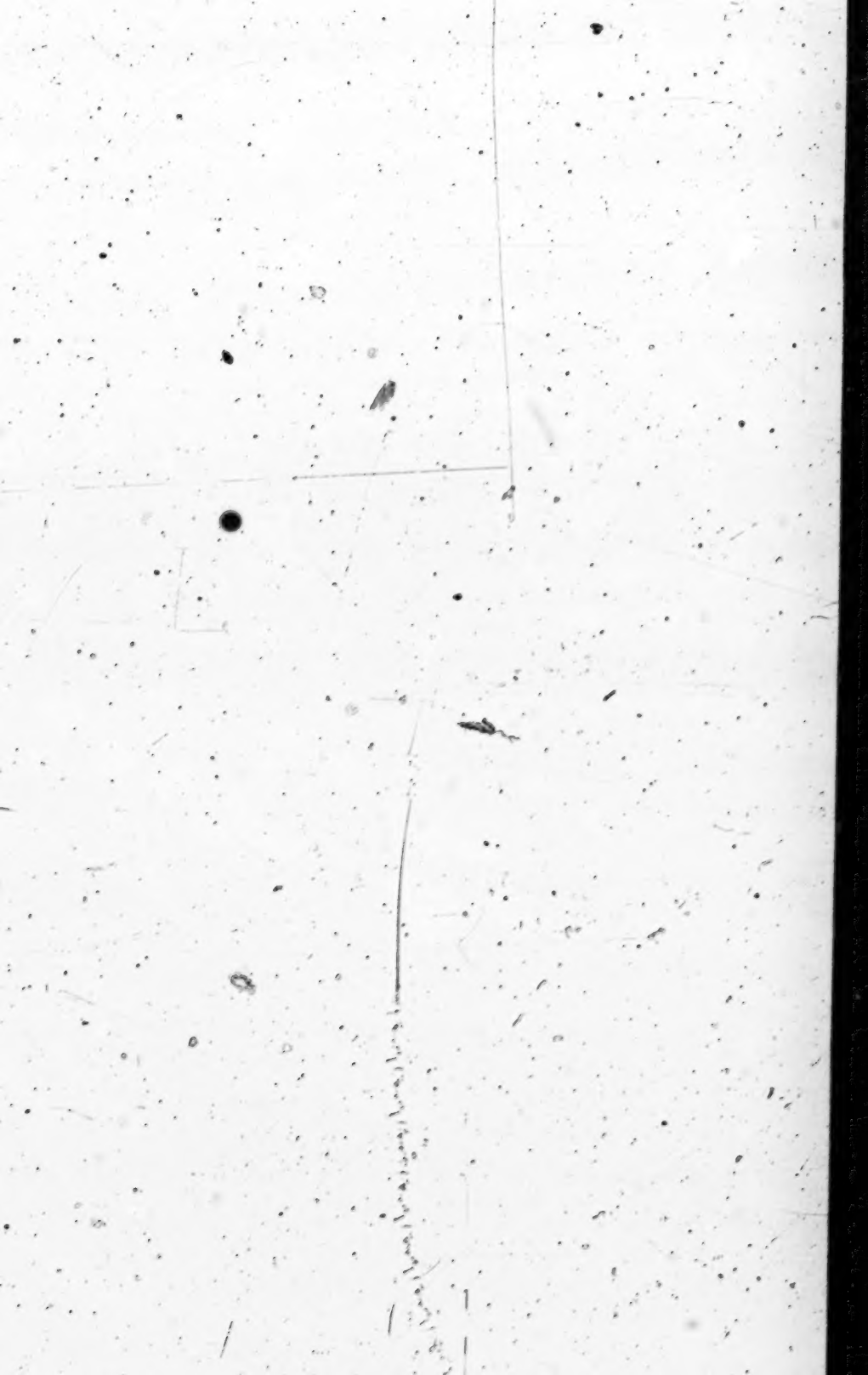
ENOCH L. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinions of the Circuit Court of Appeals[1] (R. 239–266) are as yet unreported. The oral opinion of the District Court on motion for new trial (R. 39–41) is not reported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1942 (R. 267). The petition

[1] Pursuant to stipulation the record in this Court for purposes of the petition for certiorari consists of printed appendices to the briefs of the petitioner and the respondent in the court below and the proceedings in that court. A copy of the entire transcript of the record is on file with the clerk of this Court. References to the volume of the printed appendices and proceedings below will be designated "R."; references to portions of the typewritten transcript will be designated "Tr."

for a writ of certiorari was filed on July 31, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

## QUESTIONS PRESENTED

1. Whether the trial court erred in any manner with respect to the exclusion of the petitioner from the courtroom, while under cross-examination, during argument by counsel on a point of law while the jury was also absent.

2. Whether the trial court erred in permitting certain cross-examination of the petitioner for the purpose of testing his credibility.

3. Whether the trial court erred in charging that the jury might consider the petitioner's claim of privilege against self-incrimination during his cross-examination in testing the petitioner's credibility and good faith.

## STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more

than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

## STATEMENT

The petitioner was indicted in the District Court for the District of New Jersey on June 17, 1941 (R. 1), in an indictment containing three counts charging him with wilfully attempting to defeat and evade his income taxes for the calendar years 1935, 1936 and 1937 (R. 67–79). He was acquitted on the first count as to 1935 but was convicted on the second and third counts as to the years 1936 and 1937[1] (R. 5). The second and third counts each charged the petitioner with receiving large amounts of money from the numbers game which he failed to report (R. 71–79).

Except on the motion for new trial the petitioner at no time has challenged the sufficiency of the evidence to support his conviction on the second and third counts. He does not now make this contention. The errors urged, although several in number, arise out of a single incident at the trial occurring during the cross examination of the petitioner. The background and outline of this incident are as follows:

During the period covered by the indictment and for some time prior thereto the petitioner was the

[1] He was sentenced to five years' imprisonment and fined $10,000 on each count, the sentences to run consecutively (R. 6).

political leader of the Republican party in Atlantic City, New Jersey (R. 138). From approximately July 1935, to 1939 the numbers game operated in Atlantic City as a single syndicate (R. 93, 96–97, 118–120, 122–124; Tr. 972–976). Two members of the syndicate, Weloff and Towhey, testified that from shortly after its formation to November 1937, acting alternately, they made weekly payments of $1,200 to the petitioner on behalf of the syndicate for protection (R. 94–98, 120–125, 127–128).

In November of 1937 the numbers backers relieved Weloff and Towhey of the duty of making the weekly payments, and gave it to another member of the syndicate called Southern (R. 99–101, 128), who was called as a court's witness (Tr. 865–871). He testified that after he took over the weekly payments from Weloff and Towhey he made no payments to Johnson but paid the weekly amount of $1,200 to a police inspector named Ferretti (Tr. 874–875, 881–887). Ferretti was dead at the time of the trial (Tr. 875). The syndicate continued to make weekly payments of the same amount until 1939 (R. 123–124; Tr. 822–823, 973–975).

The petitioner, on taking the stand, admitted that he had received the weekly payments from Weloff and Towhey from sometime in 1935 until November 1937 (R. 141, 144–145, 151). He denied, however, that it was paid to him for protection and asserted that it was paid for the purpose

of maintaining his personal political organization in order to secure the election of officials friendly to the numbers game (R. 140, 141–142). Thereafter he testified that he regularly expended moneys received from the numbers game for the expenses of his personal political organization, that he noted the balances remaining after such expenditures periodically on memoranda slips and sent these to his secretary for safekeeping, that when he prepared his income tax returns these slips were totalled and the total reported on his returns as "Commissions" and that these items of income on his 1935, 1936 and 1937 income tax returns represented the balance of numbers money received by him, after political expenditures, which he had appropriated to his own use (R. 144–154). Finally Johnson stated that he did not return the full amount of the numbers money because he did not consider that he owed on the entire amount (R. 156).

On cross-examination Johnson was questioned as to the system described of recording expenditures for his political organization and of keeping memoranda of the net balances of the numbers money (R. 175–181). On being asked how long he kept up the practice as to the memoranda, over objection, he stated that he carried it on through 1938 (R. 181–182). Next, Johnson admitted that he received the $1,200 during each week in 1936 but he then denied that he received the $1,200

every week in 1937 and that he had received it from Southern after Weloff stopped making the payments (R. 185–186).

Shortly thereafter Johnson was asked if he received any money from numbers in 1938 (R. 188). Objection followed and was overruled and Johnson answered, "Yes" (R. 189–190). There immediately followed the question, "Who gave it to you?" Counsel for Johnson then objected and asked that the question be argued. After argument started he further requested that the argument be made in the absence of the jury and the jury was accordingly excused. Counsel for the Government then requested that since the jury was not present the defendant also be excused and that he resume the stand without having an opportunity to hear what the argument was about. The court stated that this was a fair request and directed the petitioner to retire. He withdrew without objection by him or on his behalf (R. 190–191).

Counsel for both parties then argued at length on the propriety of the line of cross-examination and the privilege of the petitioner to refuse to answer on the ground of self-incrimination. Finally, the court ruled that the cross-examination was proper to test the petitioner's credibility but that his counsel could advise him of his right to claim the privilege against self-incrimination (R. 191–202).

On the jury's and the petitioner's return to the courtroom the question, "Who gave it to you" was repeated (R. 202). Petitioner's counsel then advised him of his privilege and the petitioner claimed the privilege (R. 202–203). After the petitioner had stated that during November and December of 1937 he paid his political expenses out of accumulated funds, he was asked what money he used for this purpose in 1938 and again claimed privilege (R. 204). Next, over objection, he identified his 1938 income tax return and testified that it contained an item of "Other commissions" as part of his income (R. 206–208). On being asked what money that represented he once more claimed privilege (R. 208). This closed the incident.

In summation, counsel for the Government commented at some length on the petitioner's claim of privilege (R. 61–62; Tr. 1910–1915). The trial court charged that the claim of privilege could only be considered by the jury in testing the petitioner's credibility and his good faith (R. 8).

The Circuit Court of Appeals affirmed the conviction (R. 267). The prevailing opinion held that the trial court did not commit error in excluding the petitioner from the courtroom, that the cross examination of the petitioner as to 1938 was proper and that no error was committed by the trial court in charging that the jury might consider the petitioner's claim of privilege in testing his credibility and good faith (R. 250–256). Judge Goodrich

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filed a separate concurring opinion on the issue as to the petitioner's presence (R. 257). Judge Jones dissented chiefly on the ground that the permission of cross-examination as to 1938 constituted reversible error (R. 257–266).

ARGUMENT

1. The petitioner first contends that his absence from the courtroom as previously described during argument of counsel to the court in the absence of the jury was in violation of his constitutional rights and hence constituted reversible error (Pet. 5–6, Br. 15–22). Although a defendant's privilege to be present during proceedings for the determination of his guilt or innocence is not found in any express constitutional provision, it has been implied in the due process and fair trial provisions of the Fifth and Sixth Amendments. The scope of this privilege has been exhaustively considered in *Snyder* v. *Massachusetts*,[1] 291 U. S. 97, and the test of the existence of the privilege at any given stage of the proceedings was held to be whether the defendant's "presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge" (291 U. S. at pp. 105–106).

[1] This case involved a state proceeding and hence the extent of the privilege of presence under the Fourteenth Amendment. The privilege under the Fifth and Sixth Amendments, however, has been treated as coextensive. See *Snyder* v. *Massachusetts*, *supra*, at pp. 105–106, 128–134, and cases cited therein.

The decision of the court below is proper under this test. In the *Snyder* case the jury, accompanied by the judge and counsel on both sides of the case, inspected the scene of the crime. Notwithstanding his request to do so, the accused was not permitted to be present, and his absence was held not to deny him due process, because it did not injure his defense. The instant case is much clearer, since here both the jury *and* the accused were absent from the courtroom. Furthermore, during their absence all that transpired was argument between counsel as to the propriety of the cross-examination of the accused by government counsel and discussion between petitioner's counsel and the trial judge as to whether petitioner must claim the privilege against self-incrimination or whether his counsel could do it for him.*

It is apparent also that the instant case does not contain the element which caused the dissenting justices to disagree with the *Snyder* decision, since here no evidence was presented to the jury in the absence of the accused.

Petitioner's contention that he had an absolute right to be present at every stage of the proceed-

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* Thus the petitioner's absence here was no more injurious to his defense than would be his absence during the argument of an appeal or a preliminary motion, when he would have no right to be present. Cf. *Doudell* v. *United States*, 221 U. S. 323; *Schaub* v. *Berggren*, 143 U. S. 442, 449; see *Snyder* v. *Massachusetts*, *supra*, pp. 107, 129; *United States* v. *Cox*, 47 F. (2d) 966 (C. C. A. 9th).

ings is derived from general statements in some early cases which were not necessary to the decisions therein. These statements have since been departed from by this Court (see *Diaz* v. *United States*, 223 U. S. 442, 458–459; *Frank* v. *Mangum*, 237 U. S. 309, 340–341; *Snyder* v. *Massachusetts*, *supra*, pp. 106, 117).

Petitioner claims that injury was done to him because had he not been excluded from the courtroom he might have been able to offer advice and suggestions to his counsel (Pet. 19). An identical claim was rejected by this Court in *Snyder* v. *Massachusetts*, *supra*, at p. 113, on the ground that the record showed that the presence of the accused could not have been an aid to his defense. The record here makes the same showing; all that occurred in the absence of petitioner and the jury was the argument of points of law.

2. The court below did not base its decision, as the petitioner appears to assert (Pet. 6–7; Br. 22–23), on the ground that he had waived any constitutional right of presence. It simply listed the defendant's acquiescence as one factor supporting its conclusion that the petitioner was not harmed by his exclusion from the courtroom during the argument (R. 250). Accordingly, this contention of the petitioner affords no ground for the granting of certiorari. Moreover, this Court has held that where the charge is not a capital one and the defendant is free on bail, he may waive the privilege

of presence and the trial may proceed in his absence. *Diaz* v. *United States, supra,* p. 455; *Frank* v. *Mangum, supra,* p. 343; *Gaines* v. *Washington,* 277 U. S. 81. Petitioner was free on bail (R. 1) and the charge was not a capital one. Therefore petitioner's failure to object to his exclusion did constitute an effective waiver of the privilege of presence.

3. The petitioner further maintains that the result of the incident in question was to deprive him of the assistance of counsel in violation of his constitutional rights under the Sixth Amendment (Pet. 7–8; Br. 23–24). A recital of the facts reveals the lack of foundation for this claim. As the line of cross-examination began counsel for the petitioner was vigorously objecting to each question. He requested argument on the point in the absence of the jury. The request of Government counsel that the defendant withdraw and return without being apprised of the nature of the argument followed.* The trial judge stated that the request was a fair one but his order was simply that the petitioner retire (R. 188–191). In the course of the argument petitioner's counsel urged that even if the cross-examination were otherwise

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*The reason for the request by Government counsel becomes apparent when it is noted that just prior to the incident in question counsel for the petitioner volunteered testimony for the petitioner and was reprimanded by the trial court for objecting in a manner to intimate to the petitioner the answers he should make (R. 185–187).

proper the petitioner was entitled to claim privilege (R. 196). The judge stated that the petitioner and not his counsel was the one permitted to claim the privilege. His counsel nevertheless persisted in objecting to the cross-examination on the ground that it tended to incriminate him (R. 197). The court ruled correctly, however, that counsel might advise the petitioner of his rights but that petitioner would have to determine for himself whether he would claim the privilege (R. 201). See VIII Wigmore on Evidence (3d ed.), Secs. 2196, 2270. The record reveals that when the petitioner resumed the stand he was advised of his privilege by his counsel and that he claimed it (R. 202–208).

Thus the facts are that petitioner's counsel attempted to claim the privilege for petitioner, and made this attempt without asking to consult his client. The court refused to permit petitioner's counsel so to bind him; petitioner himself was told of his privilege and elected to claim it. In doing so, he did precisely what his counsel had previously attempted to do for him. In view of these facts, petitioner's present suggestion that he was injured by not being permitted to hold a strategy conference with his counsel is groundless. Furthermore, no request for an opportunity to hold such a conference was made.

4. The fourth contention of the petitioner is that the trial court erroneously permitted cross-exam-

ination of him as to offenses for which he had not been but could be indicted (Pet. 8–9; Br. 24–26). He asserts that a conflict exists between this decision and prior decisions of the same court. The line of cross-examination thus assailed, however, was not an attempt to impeach the petitioner merely by proof of another crime within the prohibition of the cases cited by petitioner. The petitioner had admitted receipt of the numbers money in 1935, 1936 and 1937 and had described a system of recording his expenditures from and net balances of this money and reporting the latter on his income tax returns. He denied receiving any such money in November and December of 1937. It will be recalled that the syndicate's method of making protection payments (though Weloff and Towhey) was changed in November 1937, and that, as changed it continued from November 1937, through the year 1938. (*Supra*, p. 4.) Since Johnson denied having received any of those payments under the new system in November and December of 1937, it was relevant to inquire whether he had received any such payments in 1938 when the new system was likewise in operation. The questions as to 1938 were therefore proper cross-examination as a check upon the truthfulness of Johnson's answers with respect to November and December of 1937. *Bonness* v. *United States*, 20 F. (2d) 754 (C. C. A. 9th); *Tinkoff* v. *United States*, 86 F. (2d) 868 (C. C. A. 7th), certiorari denied, 301 U. S. 689; and

see additional cases cited in opinion below, R. 252–253. Since the questions were thus relevant and otherwise proper they were not rendered improper by any possibility that they might tend to impute to the petitioner the commission of another crime. *Cravens* v. *United States*, 62 F. (2d) 261 (C. C. A. 8th), certiorari denied, 289 U. S. 733.*

5. As a final point the petitioner maintains that the trial court erred in charging the jury that it might consider his claim of privilege against self-incrimination in testing his credibility as to the answers which he did give and his good faith. (Pet. 9; Br. 26–28). This charge was given as a limitation on comment made by the prosecution (R. 8).

An accused's privilege against self-incrimination permits him to refrain from testifying entirely but when he does voluntarily take the stand he is held to have waived his privilege, "and within the limits of the appropriate rules he may be cross-examined as to the facts in issue." *Raffel* v. *United States*, 271 U. S. 494, 497. The privilege of the accused has been reinforced by statute which prohibits the creation of any presumption against him from his failure to be a voluntary witness. Act of March 16, 1878, c. 37, 20 Stat. 30 (U. S. C., Title 28, Sec. 632). As with the privilege, however, the

* Moreover, the carefully framed charge to the jury (R. 23–24) eliminated any possibility of its misuse of this line of testimony.

prohibition against adverse inference ends with the defendant's taking the stand and fair comment upon his testimony thereupon becomes proper. Thus in *Caminetti* v. *United States*, 242 U. S. 470, a defendant, Diggs, took the stand but stopped short in his testimony and made no explanation as to a material part of the case. The trial court charged that the jury might consider his failure to testify further in reaching their conclusion as to his guilt or innocence. This Court held that charge to be proper (242 U. S. pp. 492–495). See also *Raffel* v. *United States*, 271 U. S. 494; *Fitzpatrick* v. *United States*, 178 U. S. 304, 315–316; *Reagan* v. *United States*, 157 U. S. 301, 304–311; *Tomlinson* v. *United States*, 93 F. (2d) 652 (App. D. C.), certiorari denied, 303 U. S. 646; *Krotkiewicz* v. *United States*, 19 F. (2d) 421 (C. C. A. 6th). The charge of the trial court here was carefully calculated to prevent the jury's drawing any general inference of guilt as to the crimes charged from the claim of privilege. It left open for the jury the inference that the petitioner's refusal to answer questions as to 1938 resulted from the fact that the answers to such questions would reveal the falsity of the answers as to the prior years. The court's charge was thus entirely within the holding of the *Caminetti* case and was proper. See VIII Wigmore on Evidence (3d ed.) Sec. 2273 (4).

The record discloses further that the petitioner took no exception to this portion of the court's

charge (R. 33–39, and see Tr. 1963–1966), although a number of other exceptions were taken and additional instructions were given by the court in response to some of them (R. 33–39). The petitioner, therefore, may not now assert error as to the instruction challenged. *Boyd* v. *United States*, 271 U. S. 104, 108; *Morris* v. *United States*, 61 F. (2d) 520 (App. D. C.), certiorari denied, 287 U. S. 597.

## CONCLUSION

The decision below is in all respects correct and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

Respectfully submitted.

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